

CORPORATIONS, SECURITIES AND LAND DEVELOPMENT BUREAU

ADDENDUM TO
RELEASE NO. 98-1-S

TO: All Interested Parties

SUBJECT: The Sale of Timeshare Interests as Securities in Michigan; Applicability of the Michigan Land Sales Act; Promotional Offerings of Out-of-State Property

The above release contains a typographical error. The citation in the first paragraph on page four should read: **MCL 339.2511(2)**.

Thank you.

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SUBJECT: The Sale of Timeshare Interests as Securities in Michigan;
Applicability of the Michigan Land Sales Act; Promotional Offerings of
Out-of-State Property

General Background:

For some years now the Bureau has been responding to developer requests for a no-action position to be taken on individual offerings of timeshare sales to Michigan residents. All no-action positions taken by the Bureau have involved timeshare structures with particular facts common to their design which the Bureau believes are typical of most timeshare offerings.

It is from these common developer layouts that the Bureau has identified particular elements which, if part of a developer's proposed timeshare sales plan, will eliminate the need for a request for a no-action position. This is an attempt to make offerings of timeshare opportunities to Michigan residents a more efficient process for developers of timeshare interests while preserving investor protection.

Questions have also arisen regarding the applicability of the Michigan Land Sales Act, P.A. 286 of 1972, as amended, to the sale of timeshare interests. Most timeshare developments are exempt from the registration provisions of this Act as addressed below.

There are also clarifications with regard to the advertising in Michigan of promotional sales of out-of-state property. This is also addressed below under the appropriately labeled section.

A NO ACTION POSITION ON THE SALE OF CERTAIN TIME SHARES

Action or Interpretation:

Section 401(l) of the Michigan Uniform Securities Act defines a "security" as including, ". . . any contractual or quasi contractual arrangement pursuant to which (1) a person furnishes capital . . . to an issuer; (2) a portion of that *capital is subjected to the risks of the issuer's enterprise*; (3) the furnishing of that capital is induced by the *representations of an issuer . . . which give rise to a reasonable understanding that a valuable tangible benefit will accrue . . .*; (4) the person furnishing the capital *does not intend to be actively involved in the management of the enterprise . . .*" (emphasis added).

As indicated above, many timeshare offerings are structured in a manner that frequently allows a no-action position to be taken by the Bureau. These circumstances generally involve the inclusion of five (5) elements that routinely exist in a typical timeshare plan which distinguish it from the above emphasized language in the Bureau's definition of a "security." These five elements are discussed below.

1. All timeshare offerings on which the Bureau has taken a no-action position failed to meet the risk capital test. No portion of the purchaser's money was, ". . . subjected to the risks of the issuer's enterprise . . ." That is, completion of the developer's timeshare project was not dependent upon the proceeds of the timeshares sold. This was accomplished in any combination of ways, typically: a) those proceeds were kept in escrow until completion of the project; b) a builder's bond covered the completion of the project; c) the developer utilized its own funds with or without established lines of credit with various lending institutions.
2. None of the timeshare plans were promoted/sold in a manner which promised a reasonable expectation of value above the amount invested. The sale of timeshares was not induced by representations which would give rise to a reasonable understanding that a valuable tangible benefit would accrue outside of the enjoyment of the facilities themselves. This was achieved by an emphasis in sales literature that the timeshare interest is for the owner's use and enjoyment, not investment.
3. All purchasers of a timeshare interest acquired an undivided ownership interest represented by a deed manifesting a tenancy in common with other purchasers of the same unit. This gave those purchasers actual exercise of managerial control over his or her share. Further, these timeshare agreements created a terminable contract between the timeshare residents and any company obtained for management of the facilities and grounds.

4. None of the timeshare agreements offered rental services. This assured that any profits made from timeshare unit rentals would have to come from the purchaser's own efforts; thus, ". . . the person furnishing the capital . . ." *would* have to ". . . intend to be actively involved in the management of the enterprise . . ."
5. No timeshare agreement required pooling or commingling of rental proceeds.

When the above conditions are included in the structure of a timeshare offering, the Bureau will no longer require or address requests for no action positions as such offerings will be deemed to address the Bureau's concerns in this area. Please note that the anti-fraud provisions of Section 101 of the Michigan Uniform Securities Act will be applicable to such transactions. Therefore, in the interest of efficiency, the Bureau will release the obligation of registration or requests for no-action letters for the sale of timeshare interests which contain the above five (5) elements as part of their sales agreement.

Michigan will retain jurisdiction over any timeshare offerings which fail to contain the above guidelines. This means that all five (5) elements must be present in any timeshare agreement offered in Michigan in order to qualify for this no-action position.

Should you have any questions concerning the five-factor test, please call the Securities Examination Division at (517) 334-6200.

APPLICABILITY OF THE MICHIGAN LAND SALES ACT

Section 4 of the Michigan Land Sales Act, P.A. 286 of 1972, as amended, provides exemptions to the Act's applicability. Virtually all timeshare developments are exempt from the registration provisions of this Act pursuant to Section 4(c). In part, this section states, *"Unless the method of disposition is adopted for the purpose of evasion of this act,...this act does not apply to offers or dispositions of an interest in land: (c) On which lot, parcel, or unit there is a commercial or industrial building, shopping center, dwelling unit, or apartment, or as to which there is a legal obligation on the part of the seller or his or her assignee or agent to construct a commercial or industrial building, shopping center, dwelling unit, or apartment within 2 years from date of sale, lease, option, assignment, award by lottery, or as a prize."*

The exemptions are self-determining and an application for exemption is not indicated to be required.

Telephone inquiries regarding the Land Sales Act should be directed to (517) 334-6203.

PROMOTIONAL SALES OF OUT-OF-STATE PROPERTY

Advertising of out-of-state property specifically aimed at Michigan residents, either by direct mail, telephone, or media must be done in accordance with MCL 339.2551 (2), the real estate licensing article of the Michigan Occupational Code.

Requirements include filing relevant documents with the department and coordinating any advertising and sales through a Michigan licensed real estate broker. This is true if the promotional offerings are part of a "home show" or other real estate show setting wherein literature is distributed about the offering, whether by a person or available for residents to read. If a developer uses individuals who are licensed or unlicensed in another state to provide these materials, such licensure or employment with the developer does not negate these licensure requirements even if the sales agreement is completed and closing conducted outside Michigan.

However, if a developer engages in national advertising of the development or timeshare in regional or national publications, which may be distributed in Michigan and may be read by Michigan residents, licensure as a real estate broker or submission of offering documents is not required.

For additional information concerning the advertising of promotional sales of out-of-state property please call (517) 241-9234.

SUMMARY

If all requirements are met as outlined in the previously described scenarios, registration of timeshare offerings or licensure of real estate brokers will not be required under the Michigan Uniform Securities Act, Michigan Land Sales Act or the Michigan Occupational Code. Please be advised that the burden of determining whether registration or licensure is required is on the developer or person making an offering of timeshare interests. In addition, please be sure to review the first paragraph under Promotional Sales of Out-of-State Property.

Signed by Julie Croll, Director
Corporation, Securities and Land Development Bureau

Dated: April 3, 1998